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Is Israel Committing Genocide?

Aryeh Neier

I have been engaged for six decades in the human rights movement, which has endeavored to restore peace by enforcing International Humanitarian Law. Can the law bring a measure of justice to the victims of Israel's and Hamas's violence?

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Gilles Peress/Magnum Photos

Items of clothing at a morgue, Tuzla, Bosnia, 1996

Like most of my colleagues in the international human rights movement, I use the term "genocide" sparingly. During my fifteen-year tenure at Human Rights Watch (HRW), which I cofounded in 1978, I applied the term to only one of the many great crimes that we monitored: Saddam Hussein's slaughter of the Iraqi Kurds in 1988.

The Kurds had suffered severe abuses under Saddam's dictatorship, and during the Iran–Iraq War of 1980–1988 they rebelled. In response Saddam used chemical weapons against them, as he had against Iranian forces. A particularly large attack took place in March 1988 against the Kurdish city of Halabja, killing about five thousand people. Then, over the following six months, Saddam's forces rounded up Kurdish men and boys from northern Iraq and bused them to a desert area where bulldozers had dug trenches in the sand. Thousands of victims were forced into the trenches, machine-gunned, and buried.

At HRW, it took us more than two years to discover the desert killings and burials. One person who provided crucial information was a twelve-year-old boy named Taymour Abdullah Ahmad who had climbed out of a trench with a bullet in his back. A Bedouin family found him as he crossed the desert, and they nursed him to health. Two years later Ahmad made his way back to the Kurdish region of Iraq, where we were able to get his story. We subsequently found a few other survivors.

Susan Meiselas/Magnum Photos

Taymour Abdullah Ahmad, the boy who provided Human Rights Watch with information about violence committed by Saddam Hussein's forces, displaying his bullet wounds, Kurdistan, Iraq, 1991

Iraqi forces had destroyed a dozen towns and as many as four thousand villages, looted property and farm animals on a vast scale, and imprisoned tens of thousands of women, children, and elderly people under dire conditions. Iraqi intelligence had been trained by East Germany's Stasi, and the regime kept detailed records of its actions throughout the war. In a few cities, Kurdish forces overran Iraqi security offices and captured many of these records. At HRW, we were able to have fourteen tons of them flown to the United States, and we translated them from Arabic to obtain a full picture of the crimes against the Kurds that we came to call a genocide.

In *The Destruction of the European Jews* (1961), the historian Raul Hilberg argued that the elimination of a people is "a step-by-step operation." First comes defining the group, then expropriating its resources, then concentrating its members in one place, and finally annihilating them. Saddam's campaign against the Kurds, we determined, fit Hilberg's paradigm to perfection. It clearly met the definition of genocide under international law: "Intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." We were never able to arrange a trial of Saddam's government in the International Court of Justice (ICJ), but the Iraqi interim government used some of our evidence when it tried Saddam and other leading officials, including his cousin Ali Hassan al-Majid (known as Chemical Ali), and executed them.

I stepped down as executive director of HRW in 1993, a year before the slaughter of the Tutsi in Rwanda. The organization called that, too, a genocide. In this century it has only used the term to characterize the persecution and slaughter of the Rohingya in Myanmar.

In late December, when South Africa brought to the ICJ its accusation that Israel was committing genocide in Gaza, I did not join some of my colleagues in the international human rights movement in their support of the charge. I was deeply distressed by Israel's bombing campaign, particularly by its frequent use in densely populated areas of 500- and 2,000-pound bombs—supplied by the United States—that were killing large numbers of civilian noncombatants. (On May 8 Biden halted the shipment of such bombs to prevent their use in Rafah.) Such weapons are clearly inappropriate for use in those circumstances. Yet I was not convinced that this constituted genocide.

I thought then, and continue to believe, that Israel had a right to retaliate against Hamas for the murderous rampage it carried out on October 7. I also thought that Israel's retaliation could include an attempt to incapacitate Hamas so that it could not launch such an attack again. To recognize this right to retaliate is not to mitigate Israel's culpability for the indiscriminate use of tactics and weapons that have caused disproportionate harm to civilians, but I believe that Hamas shares responsibility for many of Israel's war crimes. Hamas's leaders knew, when they planned the attack, that Israel had the most right-wing government in its history, at immense cost to the civilian population of Gaza.

Hamas's operatives do not wear uniforms, and they have no visible military bases. Hamas has embedded itself in the civilian population of Gaza, and its extensive network of tunnels provides its combatants the ability to move around quickly. Even if Israel's bombers were intent on minimizing harm to civilians, they would have had difficulty doing so in their effort to destroy Hamas.

And yet, even believing this, I am now persuaded that Israel is engaged in genocide against Palestinians in Gaza. What has changed my mind is its sustained policy of obstructing the movement of humanitarian assistance into the territory.[*]

As early as October 9 top Israeli officials declared that they intended to block the delivery of food, water, and electricity, which is essential for purifying water and cooking. Defense Minister Yoav Gallant's words have become infamous: "I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed. We are fighting human animals and we act accordingly." The statement conveyed the view that has seemed to guide Israel's approach throughout the conflict: that Gazans are collectively complicit for Hamas's crimes on October 7.

Since then Israel has restricted the number of vehicles allowed to enter Gaza, reduced the number of entry points, and conducted time-consuming and onerous inspections; destroyed farms and greenhouses; limited the delivery of fuel needed for the transport of food and water within the enclave; killed more than two hundred Palestinian aid workers, many of them employees of the United Nations Relief and Works Agency (UNRWA), the principal aid provider in the blockaded territory before October 7; and persuaded many donors, including the United States, to stop funding UNRWA by claiming that a dozen of the agency's 13,000 employees in Gaza were involved in the October 7 attack or have other connections to Hamas. (An investigation by former French foreign minister Catherine Colonna, released on April 22, concluded that Israel had provided no evidence to support its allegations and that UNRWA is "irreplaceable and indispensable.") The air strikes on April 1 that destroyed all three vehicles in a World Central Kitchen convoy, killing six international aid workers and a Palestinian driver and translator, seemed a continuation of these policies. Israel's explanation that this was the result of a "misidentification" has aroused skepticism. As a result, other humanitarian groups may be deterred from providing aid.

The cumulative effect of these measures is that many Palestinians—especially young children—are starving. In April the Gaza Health Ministry reported that twenty-eight children have died of starvation. That number could multiply many times over if reports on food insecurity are valid. On April 10 USAID Administrator Samantha Power answered "yes" when asked, at a House Foreign Affairs Committee hearing, whether famine is already occurring in Gaza. On May 3 Cindy McCain, executive director of the World Food Program, stated on NBC News that there is a "full-blown famine in northern Gaza." Deaths from famine are only a fraction of the total fatalities reported by the ministry. As of this writing, 34,904 Palestinians have been killed, including at least 14,685 children and 9,670 women, and another 78,514 have been injured. Though some Israelis dispute these figures, they are in truth probably an undercount because they do not include those buried under the rubble.

Many of those who survive malnutrition will suffer long-term consequences such as increased susceptibility to illnesses and psychological damage. In Gaza's north, UNICEF found in February that malnutrition among children under five had nearly doubled in a month. The obstruction of humanitarian assistance is unlikely to affect Hamas combatants directly. Even in conditions of famine, men with guns find a way to get fed. It is those who bear no responsibility for Hamas's crimes who are suffering most.

All access to the territory is controlled by the Israel Defense Forces, which have denied entry to Israeli and Palestinian human rights organizations and to international organizations like HRW and Amnesty International. Limiting the ability of these organizations to gather information and make detailed reports on the conflict hardly insulates Israel from criticism for its abuses. That is because international observers judge the conflict in Gaza on the basis of principles and assumptions that the human rights movement has helped to establish.

Today the human rights movement includes thousands of organizations around the world; among international citizen movements, only the environmental movement might be better developed. Amnesty International and HRW, neither of which seeks or accepts government funding, have offices and hundreds of research staff members in many countries. HRW's staff numbers over five hundred; Amnesty's staff is much larger. Over the past few decades these organizations have created a broad awareness that there is a body of law, known as International Humanitarian Law (IHL), that represents civilized values and regulates the conduct of combatants. It forbids such practices as indiscriminate bombing and requires military forces to try to protect civilians from harm. It condemns attacks that intentionally or indiscriminately destroy civilian dwellings and such structures as schools, hospitals, and places of religious worship. And it prohibits measures that are intended to starve the civilian population or to deny them other necessities of life.

Some principles of International Humanitarian Law have ancient roots. Herodotus tells us that Sparta, in violation of the customs of war, murdered heralds sent by the Persian king Xerxes to conduct negotiations. Sparta afterward sent to Persia two noblemen who were meant to pay for that crime with their lives. Xerxes refused to kill them; this, he said, would release the Spartans from their guilt for violating the customs of war. The Chinese military strategist Sun Tzu called on armies to treat captives well. Saint Augustine argued that the goal of war is not more war, but peace. Therefore conducting war in a manner that contributes to the restoration of peace is essential.

In the age of chivalry, from approximately the twelfth to the fifteenth century, specific rules were developed for those honored as knights. Courts such as the Parlement of Paris tried cases involving violations. In the seventeenth century the Dutch scholar Hugo Grotius codified the laws of war. A century later Jean-Jacques Rousseau wrote that once men have laid down their arms and submitted, "they cease to be enemies…and revert to the condition of men, pure and simple, over whose lives no one can any longer exercise a rightful claim."

Contemporary IHL is substantially based on the work of two men who made major contributions in the 1860s: Henri Dunant, a young Swiss businessman who founded what would become the International Committee of the Red Cross (ICRC), and Francis Lieber, a German-born professor of law at Columbia who drafted a detailed code that Secretary of War Edwin Stanton promulgated to regulate the conduct of Union forces during the Civil War. Lieber's code included a provision stating that when Union soldiers occupied enemy territory,

> all wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

Lieber and Stanton's efforts were aided by the invention of the telegraph, which made it possible for newspapers to employ war correspondents who reported on the conduct of military forces as battles were underway. When those forces engaged in cruel practices, that information was widely disseminated.

Another significant development took place at the end of the nineteenth century, when Tsar Nicholas II of Russia convened a peace conference at the Hague with the intent of placing limits on military expenditures and armaments. In that respect the conference failed. But it succeeded in adopting the first international treaty that placed limits on the conduct of war. This included the adoption of the Martens Clause, named for the Russian diplomat who proposed it:

> Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international laws, as they result from the usage established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

The Martens Clause gave rise to the concept of crimes against humanity, under which Nazi leaders were prosecuted at Nuremberg and Japanese military leaders were prosecuted at Tokyo after World War II.

The contemporary human rights movement began with a focus on political persecution. In 1898 the French lawyer and politician Ludovic Trarieux, motivated by the controversy over the trial in which Captain Alfred Dreyfus was convicted of spying for the Germans, launched the Ligue des Droits de l'Homme. The Ligue's early work included efforts to protect indigenous peoples in French colonies against ethnic persecution and other abuses. In 1922 it helped found the Fédération Internationale des Ligues des Droits de l'Homme (FIDH), which united sections of that organization in several European countries. It was dangerous work. Giacomo Matteotti, a leading antifascist political figure and a leader of FIDH's Italian section, was murdered by the Fascist secret police in 1924. Carl von Ossietzky, a leader of its German section who won the 1935 Nobel Peace Prize for exposing German rearmament in violation of the Versailles Treaty, was imprisoned by the Nazis and died in 1938 of tuberculosis, which he contracted in prison. Victor Basch, the president of FIDH in France, was murdered during World War II by a fascist paramilitary organization.

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A few members of the FIDH escaped France after the German invasion and made their way to the United States. They contacted Roger Baldwin, the longtime director of the American Civil Liberties Union, and joined him in establishing the International League for Human Rights, which began operating during the war years and advocated for the United Nations to incorporate a commitment to protect human rights in its charter. Another organization, the Geneva-based International Commission of Jurists, which promotes the independence of judges and lawyers, was founded in 1952; it is still active today.

The work of the ICRC, a Swiss organization that is independent of national Red Cross societies, led to the adoption of the Geneva Conventions of 1929, which were important during World War II in protecting prisoners of war of countries that had ratified them. In 1949 the ICRC organized the adoption of a revised set of Geneva Conventions, which identified "grave breaches" that should be prosecuted and also provided significant protections against abuses in internal armed conflicts.

Additional important protections for civilians were incorporated in two important Protocols to the Geneva Conventions adopted in 1977, one dealing with international armed conflicts and the other with non-international armed conflicts. The Protocols outline many of the rules that the Israel Defense Forces have been accused of violating in Gaza, including a prohibition on indiscriminate bombing and the use of starvation as a weapon of war.

In 1961, after the British lawyer Peter Benenson published an article titled "The Forgotten Prisoners" in the British newspaper *The Observer*, an item that was subsequently reprinted all over the world and called for the release of all people held for peaceful expression of their beliefs, Amnesty International was established. From the start it set out to enlist members and establish sections in many countries. At first it strictly limited itself to freeing people it designated as "prisoners of conscience." But it gradually expanded its mandate, adding the issue of torture and many other human rights concerns. The organization was also intent on remaining neutral in the cold war, insisting that its activists should "adopt" equal numbers of prisoners of conscience on opposing sides of the East–West divide, as well as in nonaligned countries.

In 1978, along with Robert Bernstein and Orville Schell, I founded the organization that became Human Rights Watch. It began as Helsinki Watch, which promoted human rights in the thirty-five countries of Europe and North America that had adopted the 1975 Helsinki Accords. These were the first international agreements to respect human rights that the Soviet Union and other communist countries joined in signing. Rights activists in Moscow and other Soviet bloc countries formed organizations to monitor compliance with them. When the Soviet Union started imprisoning those activists, we decided to form an organization to help secure their release and to extend the effort to obtain compliance with the human rights provisions of the Helsinki Accords.

As the chair and CEO of Random House, Bernstein was the publisher of some of the activists in those Soviet bloc countries, such as the physicist and Nobel Peace Prize laureate Andrei Sakharov, and so was affected by the Soviet Union's crackdown. Schell was a prominent lawyer who had chaired the New York City Bar Association and had taken part in efforts to protect the rights of lawyers. As I had served as executive director of the ACLU, my participation signaled that we were also concerned with rights in the United States. After I became executive director in 1981, we added sections dealing with rights in the Americas, Asia, Africa, and the Middle East. Once we acquired the capacity to promote rights worldwide, we renamed the organization Human Rights Watch in 1988.

Before the 1980s the principal effort to promote compliance with International Humanitarian Law consisted of attempts by the ICRC to persuade military commanders and top government officials to conduct military operations in accordance with its principles. The ICRC did not publicize its efforts, in large part because it prized its ability to obtain access to prisoners of war and other security detainees so as to provide them with protection. The organization believed it would lose such access if it publicized its interactions with military officials, and detainees would suffer.

Human Rights Watch made the decision to try to complement the confidential work of the ICRC by engaging in publicized efforts to obtain compliance with the provisions of IHL in circumstances of armed conflict. Over time other human rights organizations, including Amnesty International, followed suit. These efforts, which reflected the growing strength and capacity of the human rights movement, created public awareness of IHL and helped to establish the context in which a conflict such as the war in Gaza is being judged by concerned members of the public worldwide.

The first significant use of IHL by the human rights movement came in 1981, when the Americas division of Human Rights Watch decided, in accordance with the provisions of the Geneva Conventions and Protocols, to assess the conduct of the armed forces engaged in the civil war in El Salvador that had begun two years before. During the war, which lasted until 1992, about 75,000 people died, the great majority in killings by death squads made up of military men, in aerial bombardments by the Salvadoran Air Force of rural areas where peasants were suspected of providing food and shelter to left-wing guerrillas, and in massacres carried out by the country's military in villages suspected of harboring guerrillas. Up to that point, the human rights movement had been guided by international law largely based on UN-sponsored treaties that were intended to give legal force to the provisions of the Universal Declaration of Human Rights, which was adopted by the UN in 1948. Those treaties addressed such matters as race discrimination, the rights of women, and the rights of refugees, but they did not address the issues that arise during armed conflicts.

It was the war in Bosnia, which began in 1992, that made large parts of the human rights movement focus more closely on International Humanitarian Law. Bosnian Serb forces, which launched the war with the backing of the government of Serbian president Slobodan Milošević, announced explicitly that their purpose was "ethnic cleansing." They conducted massacres in towns with large Muslim populations. They besieged Sarajevo, killing thousands of its residents by shelling and sniping from the surrounding hills and by depriving the city's population of water, food, and other necessities. And the Serb military set up detention camps in which many inmates died after suffering from ill treatment, starvation, and sexual assault.

As the director of HRW, I proposed the establishment of an International Criminal Tribunal to deal with these crimes. There had been no such body since the Nuremberg and Tokyo tribunals in the immediate aftermath of World War II, as the onset of the cold war had made it impossible for the UN Security Council to agree on forming any. But by 1992 the Soviet Union had dissolved, and my call for a tribunal coincided with revelations in the press about the worst abuses of the Bosnian Serb detention camps. Many others took up the call, including Madeleine Albright, the US ambassador to the UN, and Robert Badinter, France's former minister of justice. In May 1993 the Security Council unanimously established the International Criminal Tribunal for the Former Yugoslavia (ICTY). It was a triumph for International Humanitarian Law.

The tribunal got off to a slow start. The UN did not have a chief prosecutor for fourteen months, and for a long period the ICTY had only a low-level prison camp guard in custody. Eventually, however, it indicted leading figures from all parties to the wars of the 1990s in the former Yugoslavia, obtained custody of all of them except those who died before they were apprehended, and conducted fair trials. Milošević died while on trial, but the leaders of the Bosnian Serbs responsible for the largest number of atrocious crimes, Radovan Karadžić and General Ratko Mladić, are still serving prison sentences today.

The UN Security Council also created the International Criminal Tribunal for Rwanda (ICTR) in 1994 in the months following the genocide in that country. It too got off to a shaky start but righted itself over time. The ICTR conducted fair trials of the figures primarily responsible for many great crimes, including former Rwandan prime minister Jean Kambanda, the first person convicted of genocide by an international tribunal, who remains in prison at this writing. The ICTR has been faulted, however, for not bringing to trial leaders of the Rwandan Patriotic Front, which overthrew the government that conducted the genocide but in the process committed major crimes itself.

In the late 1990s the UN also started forming "hybrid" tribunals with national governments to try officials and revolutionaries who had committed atrocities. The most successful of these, in Sierra Leone, sentenced Charles Taylor, a former president of Liberia, to a fifty-year prison sentence for backing the Revolutionary United Front when it committed atrocities during the civil war in Sierra Leone. In 1998 the success of ad hoc tribunals helped make it possible to convene 148 governments in Rome for the conference that established the International Criminal Court (ICC). The treaty they adopted spelled out that the court's jurisdiction includes war crimes, crimes against humanity (which can take place during times of peace as well as war, and which had not previously been spelled out in an international treaty), and genocide. Now not only could governments bring civil proceedings against other governments in the International Court of Justice; a prosecutor could also bring criminal charges of genocide against individuals at the ICC. One hundred twenty countries supported the treaty, twenty-one abstained, and seven voted to oppose it: Iraq, Libya, China, Qatar, Yemen, Israel, and the United States.

The ICC began operation in 2002. In its early years, all the prosecutions brought before it were in Africa, in part because many African countries had ratified the treaty that established the court, whereas other countries where significant crimes were committed—including China, India, and Russia—had not. The ICC may bring indictments against individuals from such states with the authorization of the UN Security Council, but the Council's permanent members, including China, Russia, and the United States, can veto any such action. In March 2023 the ICC issued an arrest warrant against President Vladimir Putin of Russia for the war crime of transferring Ukrainian children to Russia. It was able to do so because the crime was committed on the territory of Ukraine, which had accepted the court's jurisdiction. Any member state of the ICC that Putin visits is obliged to detain him.

In 2015 Palestine ratified the Rome Statute and was accepted as a party to the ICC. This appears to give the ICC jurisdiction to bring indictments both for the crimes Hamas committed on October 7 and for Israel's crimes in Gaza. If the ICC does issue indictments involving Israel's conduct in Gaza, I expect that Israel will argue that the court lacks jurisdiction on the grounds that Palestine is not a state and its ratification of the statute is not valid. But even if ICC prosecution does not become a significant factor in the conflict, the court's existence has contributed to a public awareness that Israel's and Hamas's actions should be judged in accordance with contemporary standards of International Humanitarian Law.

If it were feasible, establishment of an ad hoc tribunal along the lines of the International Criminal Tribunal for the Former Yugoslavia or for Rwanda would be a good way to address the crimes committed by Hamas and the crimes committed by Israel since October 7. Such a tribunal could bring indictments against Hamas leaders who were in places like Qatar or Lebanon rather than Gaza on October 7 but who took part in planning and directing the assaults against Israeli civilians. It could also bring charges against Israeli officials who made decisions about the use of weapons and tactics that were designed to kill large numbers of civilians, and about the policies that continue to deny food, water, and other necessities to the civilian population of Gaza.

The chances of securing the creation of such a tribunal by the UN Security Council are, of course, slim. The United States could use its veto power to protect Israel, and Russia, which has prevented the establishment of a tribunal for Syria by the ability to exercise its veto power, is unlikely to be enthusiastic. In the absence of a special tribunal, prosecutions could be initiated by the International Criminal Court, which has been investigating possible war crimes by both Palestinian and Israeli actors since 2021. In recent days rumors have circulated that the ICC is preparing arrest warrants for Israeli prime minister Benjamin Netanyahu, Gallant, and IDF chief of staff Herzi Halevi—a rumor Israeli officials have responded to with indignation—as well as leaders of Hamas. Netanyahu's assertion that ICC indictments would be antisemitic is indicative of his promiscuous use of antisemitism allegations. In the event that its head of government is charged, Israel is likely to object on the grounds that Palestine is not a state that could authorize such proceedings.

The International Court of Justice is considering the accusation that Israel is committing genocide in Gaza. The ICJ does not have criminal jurisdiction, and it is not able to adjudicate charges involving war crimes or crimes against humanity. Even so, if it ultimately finds that Israel has committed genocide, that will be a resounding defeat for a state that was born in the aftermath of a genocide that many of its founders had barely survived.

I have been engaged in efforts to protect human rights for more than six decades, often in circumstances with exceedingly high stakes. I cannot recall any dispute over rights that aroused greater passions and more debate than that involving the war in Gaza since October 7. There is much about it that is deeply depressing, including how difficult it is to find a way to give victims any hope that justice will eventually be done. I myself hope that the frequent citation of International Humanitarian Law as the standard for judging the conflict will have a positive effect. Whatever else emerges from this war, and whatever judgment comes from the ICJ, it is evident that Israel has done itself as well as its Palestinian victims long-term harm. ●

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